RE LANG ZA THONG; EX P JABATAN IMIGRESEN MALAYSIA

HIGH COURT MALAYA, JOHOR BAHRU
JEFFREY TAN J
[CRIMINAL REVISION NO: 43-23-2008]
5 AUGUST 2008

IMMIGRATION: *Detention - Order for - Removal of non-citizen persons from Malaysia - Jurisdiction of Sessions Court to make order - Exercise of High Court's revisionary power - Immigration Act 1959, s. 51(5)(b)*

CIVIL PROCEDURE: *Jurisdiction - Sessions Court - Order for detention for purpose of removal of non-citizen persons from Malaysia - Immigration Act 1959, s. 51(5)(b)*

CIVIL PROCEDURE: *Jurisdiction - High Court - Revision, powers of - Exercise of*

WORDS & PHRASES: *"shall" - Immigration Act 1959, s. 51(5)(b) - Whether directory*

This was an application by the applicant to revise the Sessions Court's ruling that there was no jurisdiction to make an order of detention for the purpose of the removal of non-citizen persons from Malaysia. The applicant had applied to the said Sessions Court for an order under s. 51(5)(b) of the Immigration Act 1959 ('Act') to detain a Myanmar national, one Lang Za Thong, for a period of two months for the purpose of effecting his removal from Malaysia. The applicant informed the said Sessions Court that the subject was handed to the Immigration Department and that an order of removal was made under s. 34 of the Act. The said Sessions Court declined to make the detention order, resulting in the present appeal.

Held (ordering the Sessions Court to hear *de novo* the application):

(1) In the case of a detention order required by an immigration officer, the magistrate shall make the detention order for the purpose of (i) investigations into an offence against the Act, or (ii) making inquiries, or (iii) effecting the removal of the subject from Malaysia under the Act. The jurisdiction to make an order of detention for the purpose of effecting the removal of a subject from Malaysia under the Act is there for all to

A see. Indeed, upon application to a Magistrate, it is incumbent upon him, for the word "shall" is directory, to make the s. 51(5)(b) order. The discretion, if any, is only in relation to the period of detention. Yet in this instance, it was held that there was no jurisdiction to make the s. 51(5)(b) order. That
B misdirection must be put right, but not by way of the appeal process which could only exacerbate the duration of detention to the detriment of the subject. Given the exigencies of this case, the exercise of revisionary power was the only course that could swiftly put things right and yet not hold the
C subject longer than absolutely necessary to effect his early removal from Malaysia and hence early release, albeit not in Malaysia. Accordingly, it was ordered that the said Sessions Court do hear *de novo* the application for the said s. 51(5)(b) order. (paras 5, 6 & 7)

D *[Order accordingly.]*

Case(s) referred to:
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***

E **Legislation referred to:**
Immigration Act 1959, ss. 34, 51(5)(a), (b)

For the applicant - Mirza Mohamad; AG's Chambers

F *Reported by Suresh Nathan*

JUDGMENT

G **Jeffrey Tan J:**

[1] This is an application (by letter dated 28 July 2008) to the High Court to revise the ruling of the Pekan Nanas Sessions Court, which held, on 24 July 2008, that there is no jurisdiction
H to make an order of detention for the purpose of the removal from Malaysia of persons who are non-citizens.

[2] The record of the proceedings before the said Sessions Court revealed the following. By letter dated 23 July 2008, the applicant applied to the said Sessions Court for an order under
I s. 51(5)(b) of the Immigration Act 1959 (Act), to detain a Myanmar national, one Lang Za Thong, for a period of two months for the purpose of effecting his removal from Malaysia. In

that letter, the applicant informed the said Sessions Court that the subject was handed to the Immigration Department on 14 July 2008, and that an order of removal from Malaysia was made (Part V of the Act provides that an order of removal is made by the Director-General of Immigration) under s. 34 of the Act on 14 July 2008. On 24 July 2008, the said Sessions Court declined to make the detention order. The said Sessions Court minuted the following grounds: "Permohonan ditolak. Mahkamah tidak mempunyai bidangkuasa untuk membuat tahanan reman bagi tujuan pengusiran".

[3] Section 51(5)(a) of the Act is applicable only to citizens of Malaysia. In relation to persons who are not citizens of Malaysia, s. 51(5)(b) of the Act provides as follows:

> (5) Nothwithstanding anything contained in this Act or in any subsidiary legislation made under this Act:
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> (b) where any person other than a citizen is arrested or detained under this Act, whether for an offence against this Act or otherwise than for an offence, and has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, he shall, within 14 days of his arrest or detention, be produced before a Magistrate who shall make an order for his detention for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia under this Act,
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> and any provisions of this Act or any subsidiary legislation made under this Act providing for the arrest or detention, otherwise than for an offence, of a person who is a citizen, for the arrest or detention of a person other than a citizen, whether for an offence under this Act or otherwise than for such offence, shall be read as being subject to the provisions of paragraph (a) or (b), as may be applicable.

[4] The provisions of s. 51(5)(b) of the Act are clear and unambiguous. Where a person other than a citizen is arrested or detained under this Act, whether for an offence against the Act or otherwise than for an offence, and has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, he shall, within 14 days of

his arrest or detention, be produced before a Magistrate. That person to be produced before a Magistrate within 14 days of his arrest or detention is (i) a non-citizen who is arrested or detained under this Act whether for an offence against the Act or otherwise than for an offence, and, (ii) who has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act. The word "or" is to link alternatives. Hence, where a non-citizen is arrested or detained under the Act and has not been released, he shall, within 14 days of his arrest or detention, be produced before a Magistrate. In the other situation, where a non-citizen is arrested or detained under the Act and has not been charged, he shall, within 14 days of his arrest or detention, be produced before a Magistrate. And in the third and last situation, where a non citizen is arrested or detained under the Act and has not been removed from Malaysia, he shall, within 14 days of his arrest or detention, be produced before a Magistrate.

[5] As for that Magistrate, he shall make an order for the detention of the subject for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia under this Act. That Magistrate shall make an order for the detention of the subject for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act. And that Magistrate shall make an order for the detention of the subject for such period as may be required by an immigration officer for the purpose of either making inquiries, or effecting the removal of the subject from Malaysia under this Act. In the case of a detention order required by a police officer, the Magistrate shall make the detention order only if it were for the purpose of investigations into an offence against this Act. But in the case of a detention order required by an immigration officer, the Magistrate shall make the detention order for the purpose of (i) investigations into an offence against this Act, or (ii) making inquiries, or (iii) effecting the removal of the subject from Malaysia under the Act. The jurisdiction to make an order of detention for the purpose of effecting the removal of a subject from Malaysia under the Act is there for all to see. Indeed, upon application to him, it is incumbent upon a Magistrate, for the word "shall' is directory, to

make the s. 51(5)(b) order. The discretion, if any, is only in relation to the period of detention. Yet it was held that there is no jurisdiction to make the s. 51(5)(b) order. That misdirection must be put right, but not, it appeared, by way the appeal process which could only exacerbate the duration of detention to the detriment of the subject.

[6] In *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201, the Federal Court per Abdul Hamid Mohamad CJ authoritively reaffirmed that "the revisionary power of the High Court is exercisable at the discretion of the court and that the discretion is untrammelled and free, so as to be exercised fairly according to the exigencies of each case".

[7] Given the exigencies of the instant case, it would only appear that the exercise of revisionary power is the only course that could swiftly put things right and yet not hold the subject longer than absolutely necessary to effect his early removal from Malaysia and hence early release, *albeit* not in Malaysia. Accordingly, in the exercise of revisionary power, it is hereby ordered that the said Sessions Court do hear *de novo* the application for the said s. 51(5)(b) order.

[8] In relation to the other three *ex parte* applications (43-25-2008, 43-26-2008, and 43-29-2008) to this court to similarly revise similar rulings by the said Sessions Court, it is hereby further ordered that the said Sessions Court do hear *de novo* the applications for the said s. 51(5)(b) order.